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In the Supreme Court of the United States

OCTOBER TERM, 1973

JOSEPH DiVARCO and JOSEPH ARNOLD,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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OCTOBER TERM, 1973

NO.

JOSEPH DiVARCO and JOSEPH ARNOLD,
Respondent.

vs.

THE UNITED STATES OF AMERICA,
Petitioners,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Joseph DiVarco and Joseph Arnold, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment of conviction entered by the United States District Court for the Northern District of Illinois.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported and is printed in the Appendix to this Petition (Appendix A).

JURISDICTION

The judgment of the Court of Appeals was entered on August 14, 1973 (Appendix B). A timely Petition for Rehearing was denied on October 10, 1973 (Appendix C). This petition is filed within 30 days of the denial of the Petition for Rehearing. The jurisdiction of this Court was invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether it is reversible error in a jury trial for the judge to allow the government to impeach the veracity of a defendant by introducing two prior felony convictions that were rendered in 1935 and 1948.

2. Whether a person who misrepresents the source of his income, but not the amount, can properly be convicted in violation of Title 26, U.S.C., Section 7206(1).

NATURE OF CASE

The petitioners, DiVarco and Arnold, were indicted in the United States District Court for the Northern District of Illinois for violation of 26 U.S.C. 7206(1), willfully and knowingly subscribing to and making a false statement as to the source of income on their individual 1965 tax returns (Counts II and III, respectively), and 18 U.S.C. 371, conspiracy to do same (Count I). (App. A, P. 1) [1]

The defendants entered pleas of not guilty to all counts and proceeded to trial before the Honorable Hubert L. Will and a jury on June 5, 1972. On June 15, 1972, the jury returned verdicts of guilty on all three counts (App. A., P. 2).

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[1] References to (App. A. P. 1) are to the Opinion of the Seventh Circuit Court of Appeals below. References to (Tr.) are to Official Transcript of proceedings.

STATEMENT OF THE CASE

The government's only witness on the issues in this case was Irwin "Pinky" Davis, a three-time convicted felon, who testified that while he was associated with Chemical Mortgage and Investment Corporation, (hereinafter referred to as C.M.I.), an admittedly fraudulent operation (Tr. 377-379; 504), in April, 1965, and again in early 1966, the Petitioner, Arnold, requested that Davis obtain from C.M.I. evidence of an income source although the petitioners were not employed with C.M.I. Subsequently, C.M.I. W-2 forms were issued to Arnold for $5,700.00 and DiVarco for $6,750.00 (Tr. 373). The Petitioners filed their 1965 income tax returns listing C.M.I. as the source of such income.

The Petitioner, Arnold, denied Davis' accusation, testifying that the W-2 forms were issued pursuant to investment returns (Tr. 997-998; 1002). Davis testified no such investment was made by either Arnold or DiVarco (Tr. 278, 290, 324, 426, 590).

The trial Court ruled that Petitioner Arnold's testimony could be impeached by the introduction of two prior felony convictions in 1935 and 1948. (See Appendix A)

REASONS FOR GRANTING CERTIORARI

I.

IT WAS REVERSIBLE ERROR FOR THE TRIAL JUDGE TO ALLOW THE GOVERNMENT TO INTRODUCE PRIOR CONVICTIONS IN 1935 AND 1948 TO IMPEACH THE PETITIONER, ARNOLD.

In *United States* v. *McCarthy,* 445 F.2d 587 (7th Cir., 1971), the Seventh Circuit incorporated and adopted proposed Rule 609 of the *Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates.* In *McCarthy,* the conviction was reversed because the defendant was impeached by a prior felony conviction rendered in 1932. In *United States* v. *Malasanos,* 472 F.2d 642 (7th Cir., 1972), the Seventh Circuit reaffirmed *McCarthy,* explaining that although . . . "The proposed rules, by their terms, are not effective until July 1, 1973 . . . This Court in *United States* v. *McCarthy* . . . indicated that the proposed rules should be used as guidelines by district courts." The Court in *Malasanos* did not invoke *McCarthy's* time limitation ruling because ". . . The present case was tried some seven months prior to *McCarthy.*" *Malasanos, supra,* at P. 645, Note 3.

In the instant case the trial judge was apprised of *McCarthy,* but refused to invoke its guidelines regarding the petitioner, Arnold's 1935 and 1948 prior felony convictions for postal extortion and interstate transportation of a stolen auto, respectively. In upholding the trial court's ruling, the Seventh Circuit retreated from *McCarthy's* tenets because the Proposed Rules did not become automatically effective on July 1, 1973, as anticipated. (App. A, Pp. 10-11)

Although the adoption of the *Draft of the Proposed Rules of Evidence* was delayed and revisions have been extensively made since July 1, 1973, the Congressional Committee on Criminal Justice has not changed the import of Rule 609 as to the ten year time limitation. In the original draft of the proposed rules the time limitation on the admission of a prior criminal conviction was ten years. In the committee print out of June 28, 1973, Rule 609's ten year limitation was maintained. In the subcommittee's October 10, 1973 print out Rule 609 appears intact and the ten year time limitation remains unchanged. Therefore, it is apparent that the Seventh Circuit's reluctance to recognize the ten year time limitation because the proposed rules were not automatically adopted is ill-founded in light of the fact that the ten year time limitation has been continually affirmed and reaffirmed by the Congressional Subcommittee on Criminal Justice.

The Seventh Circuit's Opinion mistakenly relied on *Gordon* v. *United States*, 383 F.2d 936 (D.C. Cir., 1967). The *Gordon* case was based on the fact that the defendant there did not object at the trial to the introduction of the prior convictions. The Court in *Gordon* held that it was not plain error for the judge to have allowed these convictions to evidence. The *Gordon* case, therefore, is not the basis for the changing of the Seventh Circuit's Rule in *McCarthy*. Further, the reading of *Gordon* would, in fact, support the Petitioner's position here, for the Court in *Gordon* stated:

> ". . . We must look to the legitimate purpose of impeachment which is, of course, not to show that the accused who takes the stand is a 'bad' person but rather to show background facts which bear directly on whether jurors ought to believe him rather than other and conflicting witnesses."

The Court in *Gordon* further went on to say that though deceit, fraud and stealing go to the credibility of a witness, convictions for violent acts should not be admissible. The Seventh Circuit's Opinion at P. 11 apparently confuses the conviction of the witness, Davis, with those of Arnold. Arnold's conviction for postal extortion was certainly a conviction for a violent crime, and interstate transportation of a stolen automobile does not constitute theft.

Further, the Seventh Circuit's opinion completely overlooks the statement in *Gordon* that:

> "Even one involving fraud or stealing, for example, if it occurred long before and has been followed by a legally blameless life, should generally be excluded on the grounds of remoteness." (P. 940)

The government's rationale then is the same as that in *McCarthy* that when the conviction is remote, as with those of Arnold, the convictions should not be introduced into evidence.

The entire government's case was based on a four-time convicted defrauder, and certainly, therefore, the evidence of the defendant's guilt was extremely close. The Seventh Circuit, therefore, incorrectly distinguished *McCarthy* by stating that in *McCarthy* "there was substantial reason for believing that the evidence of the prior conviction brought about the conviction being appealed in *McCarthy.*" (App. A, P. 10)

WHEREFORE, the trial Court erred in allowing introduction of evidence of the defendant, Arnold's two prior felony convictions.

II.

THE DEFENDANTS' ALLEGED MISREPRESENTATIONS DO NOT CONSTITUTE AN OFFENSE UNDER TITLE 26 U.S.C., SECTION 7206(1).

The Petitioners herein did not evade paying their 1965 federal income tax. Indeed, according to the government's evidence, they overstated their income and paid more taxes than their income required. However, the Seventh Circuit upheld the trial judge's ruling that the "plain language" of Title 26 U.S.C., Section 7206(1) covers any "material matter" stated on the tax return, regardless of the trial Court's concession that this case constituted a case of first impression under Section 7206(1) in that the alleged misstatement was only as to the source of income and did not involve either understatement of income or overstatement of deductions (App. A, P. 3).

It is the Petitioners' contention that the proper charge lay within the general scope of Title 18, U.S.C., Section 1001 and not 26 U.S.C., 7206(1). *Beacon* v. *United States,* 344 U.S. 43 (1952). However, the government had allowed the Statute of Limitations to run under Title 18 U.S.C., Section 1001. Section 1001 encompasses all false statements made to a governmental agency, and the mere fact that an alleged false statement happens to have been made on a Federal income tax return does not give the government jurisdiction to prosecute under Title 26, Section 7206(1). As is pointed out in *United States* v. *Lodwick,* 410 F.2d 1202 (8th Cir., 1969), violations of Title 26, Section 7206(1) are lesser included offenses under Title 26, Section 7201. Only income tax cases are contemplated under Title 26, Section 7206(1) and, therefore, there must be, for example, a false understatement of income, a false overstate-

ment of deductions, a false understatement of capital gains, a false overstatement of capital losses, or the false reporting of a long-term capital gain where, in fact, a short-term capital gain occurred.

The government relied on various authorities for the proposition that the tax consequences of the misrepresentations are irrelevant. In its reliance on *Gaunt* v. *United States*, 184 F.2d 284 (1st Cir., 1950), the government obviously confused the necessity under Title 26, Section 7206(1) of tax consequences as a result of the false statement with the necessity of either understatement of income or overstatement of deductions. *Gaunt*, a case involving an understatement of income, merely says that a tax need not be due and owing for there to be a violation of Title 26, Section 7206(1). *Gaunt* stands for the proposition that if there is a false understatement of income or overstatement of deductions, the fact that for some other reason a tax is not due and owing, there still can be a violation of Title 26, Section 7206(1).

United States v. *Rayor*, 204 F.Supp. 486 (S.D. Cal., 1962) does state that "the choice [of Sections of the Code under which to prosecute, either Title 18, Section 1001 or Title 26, Section 7206(1)] lies with the Government." However, in that case, there was an understatement of income. Under those circumstances, the government can choose between the two statutes. However, where there is no understatement of income or overstatement of deductions, the government is limited to prosecution under Title 18, Section 1001. Since the alleged false statement here is limited to the petitioners' stated source of income, there was no violation prescribed by Title 26, Section 7206(1).

CONCLUSION

For the foregoing reasons the Petitioners respectfully submit that a Writ of Certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1972 — APRIL SESSION, 1973

No. 72-1804

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH DIVARCO AND JOSEPH ARNOLD,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 72 CR 177
HUBERT L. WILL, *Judge.*

ARGUED APRIL 26, 1973 — DECIDED AUGUST 14, 1973

Before MOORE, *Senior Circuit Judge,** and CUMMINGS and PELL, *Circuit Judges.*

PELL, *Circuit Judge.* The defendants Joseph DiVarco and Joseph Arnold were charged in separate counts of an indictment with willfully and knowingly making and subscribing to a false statement on their respective 1965

* Senior Circuit Judge Leonard P. Moore of the Second Circuit is sitting by designation.

federal income tax returns, which returns were verified by written declarations that they were made under the penalties of perjury, in violation of 26 U.S.C. §7206(1). The two defendants were also indicted for conspiracy in violation of 18 U.S.C. §371 in that they conspired with Irwin Davis, an unindicted co-conspirator, in violation of 26 U.S.C. §7206(1) to report a false source of income from Chemical Mortgage & Investment Corporation, of which Davis was a stockholder and agent, "so as to conceal from the Internal Revenue Service of the United States the true source of the income reported and to prevent examination by the said Internal Revenue Service as to the truth or falsity of the income reported."

A jury found the defendants guilty as charged and each was sentenced to one year on the conspiracy count and to five years on probation on the substantive counts, the probation to run consecutively to the period of imprisonment.

On this appeal, appellants raise three separate grounds for reversal: the impropriety of prosecution under 26 U.S.C. §7206(1) when there was no showing of an understatement of income; improper activity of the district judge; and the erroneous admission into evidence of defendant Arnold's prior felony conviction.

I

Chapter 75, subchapter A, of the Internal Revenue Code of 1954, as amended, 26 U.S.C. §§7201-7241, is concerned with tax crimes. Sections 7201-7207, inclusive, which in the aggregate relate to attempts to evade or defeat tax, to failures to act, and to fraud, all include the word "willfully" in their respective contexts. Specifically, §7206 is a felony statute and reads:

"§7206. Fraud and false statements.

"Any person who—

"(1) Declaration under penalties of perjury.

"Willfully, makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . .

• • •

"shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

Appellants contend that since there was no showing by the Government that they had in fact understated their income, 26 U.S.C. §7206(1) was not applicable and only the general federal false statement statute, 18 U.S.C. §1001, related to their alleged misconduct. Prosecution under that section was allegedly barred by the statute of limitations.[1] The district court in a memorandum opinion, *United States* v. *Di Varco,* (CCH) 72-1 U.S. Tax Cas. ¶9470 (N.D. Ill. 1972), concluded that the source of income was a "material matter" and that the willful and knowing misstatement of the source of income was covered by the prohibition in §7206(1).

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[1] The fact that the conduct may also be in violation of 18 U.S.C. §1001 is not dispositive of the case. *United States* v. *Beacon Brass Co., Inc.*, 344 U.S. 43 (1952). Overlap does exist within the criminal provisions of the Internal Revenue Code itself, *e.g.*, 26 U.S.C. §§7206(1), 7207. *United States* v. *Bishop*, 41 U.S.L.W. 4765 (U.S., filed May 29, 1973).

. . . It is true, as contended by the defendants and observed by Judge Will in his opinion, that most, if not all, of the cases involving misstatement of source of income also involved an understatement of taxable income. However, "[o]ne of the more basic tenets running through all the cases is that the purpose behind the statute is to prosecute those who intentionally falsify their tax returns regardless of the precise ultimate effect that such falsification may have." 72-1 U.S. Tax Cas. at 84,628.

We agree with and adopt Judge Will's opinion as to materiality. The plain language of the statute does not exclude the matter of the source of income from the definition of "material matter." In light of the need for accurate information concerning the source of income so that the Internal Revenue Service can police and verify the reporting of individuals and corporations, a misstatement as to the source of income is a material matter.[2]

As to the defendants' argument that they should only have been charged under 18 U.S.C. §1001, "the choice lies with the Government, and it is not the privilege of the defendant to say that the Government should have proceeded under a different section." *United States* v. *Rayor*, 204 F. Supp. 486, 489-90 (S.D. Cal. 1962), *appeal dismissed*, 323 F.2d 519 (9th Cir. 1963), *cert. denied*, 375 U.S. 993 (1964).

Appellants also contend that, as in *Spies* v. *United States*, 317 U.S. 492 (1943), it was incumbent on the Government to prove specific intent and evil motive and pur-

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[2] We note that the Court in *Spies* v. *United States*, 317 U.S. 492 (1943), indicated that Internal Revenue Code section 145(a) made it a misdemeanor willfully to fail to make a return, keep records, or supply information when required *"without regard to existence of a tax liability."* 317 U.S. at 496. (Emphasis supplied.)

pose. Since the Government never proved that appellants had other sources of income which they were seeking not to disclose, it is argued that the proof of evil purpose was insufficient. While *Spies* involved a violation of the predecessor to 26 U.S.C. §7201, §145(b) of the Revenue Act of 1936, which proscribed attempts to "evade or defeat any tax" and not false swearing on a return, nevertheless, it is clear that willfulness under §7206(1) also requires proof of bad purpose or evil motive. *United States* v. *Bishop, supra,* 41 U.S.L.W. at 4769. This is not to say, however, that the evil motive must have been to evade the payment of taxes, which was what was involved in *Spies.* Here there was evidence from which the jury could have found, and apparently did, that the defendants reported income but falsely reported the source. Evil motive, of course, was not admitted. It seldom is. Of necessity, it is ordinarily proven by other evidence from which the inference may fairly be drawn that the evil motive existed at the pertinent time.

While the district court in its charge to the jury did not advert to bad purpose or evil motive *in haec verba,* we find no difficulty in discerning from the thorough coverage afforded by the instructions that the jury was told of the necessity of the *mens rea.* The following extracts from the charge sufficiently demonstrate the point:

> "That is the statute. Any person who wilfully makes and subscribes any return, statement or other document which contains or is verified by a written declaration that is made under the penalties of perjury and which he does not believe to be true and correct as to every material matter, shall be guilty of an offense against the United States.
>
> • • • •

"Second, that the maker of the return did not believe the return to be true and correct as to a material matter. Obviously, that is what the statute says. Has to be a knowing and willful filing of a document which contains a statement which the maker does not believe to be true and correct.

* * * *

"If, on the other hand, you are not satisfied the government has established both of those propositions beyond a reasonable doubt, if they fail to establish either one, that is, that the return was false as to the source of the income, and that the defendant did not reasonably believe it to be true and correct as to a material matter, then you will find the defendant innocent, not guilty as charged.

* * * *

"I used the words 'false' for example, talking about a false statement. Well, false means a statement, if untrue when made and then known to be untrue by the person making it or causing it to be made. In law, false is something a little bit more than just an inaccurate statement. It is an inaccurate statement known to be inaccurate.

"People make inaccurate statements accidentally. That is not a false statement in law. That is just an incorrect statement, inaccurate statement. When you say 'false' you mean an inaccurate statement which the maker knows [is] inaccurate.

"I have talked about knowing and willfully. You should understand what knowing and willfully are all about.

"Well, they are just about what you think they are. Knowing and willfully means that you are doing something deliberately, not accidentally, not inadvertently, not mistakenly; that you are doing something — you know, the reason why we put this in the law is that people won't be convicted for accidental, inadvertent, mistaken acts. They will only be convicted for doing

something knowingly and willfully, deliberately, intentionally, with a purpose to do something which the law forbids, or to fail to do something which the law requires.

"Which brings me to the subject of intent.

"Under our system of justice, two things are required to make a person guilty of violating the law. He has to do an act and he has to do it with the requisite criminal intent. Specific intent is what is talked about in cases of this kind.

"As that term implies, specific intent means more than just the intention to do an act. It means not only the intention to do the act, but to do the act knowingly and knowing that it is an act which the law forbids, purposely. In other words, intending to violate the law."

The evidence was more than sufficient to sustain the charge of violation of §7206(1).

II

Appellants next contend that the district judge's participation in the trial of this case violated the principles of fair trial enunciated in *United States* v. *Hill,* 332 F.2d 105 (7th Cir. 1964). In *Hill,* the district judge participated extensively in the cross-examination of the defendant and his witnesses while asking only two questions of Government witnesses, both of which brought out answers highly favorable to the Government. Further, the judge knew that the answers would be favorable as he had heard the testimony of the same witnesses in a previous trial. The case was a close one but this court held that "the cumulative effect of the Court's questions and statements constituted prejudicial error requiring a new trial." 332 F.2d at 107.

Although the district judge in the present case did not remain woodenly and silently on the bench, it is our conclusion, after reading the transcript of the trial, that his questioning of witnesses and his colloquies with counsel were for the purpose of clarifying the issues for the jury and expediting the trial. The case was not without complexity and the presentation of evidence could have resulted in confusion if the issues were not made clear. Thus, with respect to both the Government and the defendants, the district judge sought to explain to the jury the purpose of testimony which at times was only tenuously connected with the gravamen of the offense.

The district judge has a duty to see that the trial does not become confusing or repetitious. "A trial judge is at liberty to question a witness to clarify a particular point, and where, as here, he does so without engaging in advocacy or displaying prejudice or partiality, no error can be predicated upon such examination." *United States* v. *Esquer,* 459 F.2d 431, 435 (7th Cir. 1972). In fact, in *Hill, supra,* the court went even further by quoting approvingly from *Gomila* v. *United States,* 146 F.2d 372, 374 (5th Cir. 1944), to the effect that "[i]n aid of truth and in furtherance of justice, the court may question a witness,—in fact, he may call and question a witness not used by either party . . . ." A defendant does not have a constitutional right to a confused trial. The emphasis in all of the opinions in this area has been on the necessity for the trial judge to avoid any hint of partiality, for instance, either by questioning only defense or only prosecution witnesses or by eliciting only information favorable to the prosecution or by appearing to disbelieve the testimony of any witness.

The district court judge made it clear to the jurors that they were to decide the case. "I will save you the truama and strain of trying [to figure out how the judge

would decide it] because I will tell you right now what I think the verdict in this case should be; and I believe the verdict in this case should be what the 12 of you unanimously decide it is, and that is all."

Nevertheless, because of the gravity of the charge that "the trial court's extensive participation in the trial of this case was contrary to the principles enunciated [in *Hill*]," we have examined each of the claimed instances of improper judicial intrusion. These, of course, should not be considered in isolation but in the context of the testimony the trial proceedings as a whole. On that basis we reach the same conclusion this court did in *United States* v. *Cassell*, 452 F.2d 533, 537 (7th Cir. 1971): "We are not persuaded the questions asked were improper as an abuse of discretion or a violation of judicial ethics. The questions were for the purpose of expediting the trial and clarifying testimony and therefore proper." Our examination of the record does not convince us that the jurors could upon any reasonable basis have concluded that the judge was other than fair and impartial.

We have not deemed it necessary to extend the length of this opinion by a detailed recital of the claimed transgressions of the trial judge. However, we do note specifically two matters not connected with questions during the course of the trial.

The first of these matters appears to resolve itself into a complaint that the judge had provided the Government with an additional theory of liability which culminated in an instruction. The language of the instruction was not suggested by any of the parties; however, we are unaware of any basis for declaring an instruction improper because it is phrased in the court's own words. The instruction complained of did nothing more than analyze steps in resolving the basic issue in dispute as to

whether or not the defendants reasonably believed that the income they had reported as coming from Chemical Mortgage and Investment did in fact come from that source.

Secondly, the trial judge had conducted a private voir dire of each juror concerning possible prejudice from extensive media coverage of the trial. However, it was the defense counsel who had suggested the necessity of such an inquiry, and he also agreed that no court reporter need be present. Our consideration of the judge's report of the colloquy with one of the jurors leaves un unimpressed with the appellants' contention that the judge somehow improperly commented on the evidence to that juror. We note particularly that trial counsel made no objection at that point to the reported colloquy and at the conclusion of the report expressed his satisfaction with the inquiry and the jury.

III

The final ground for reversal raised on this appeal concerns the admission for impeachment purposes of Arnold's prior felony convictions. Arnold had three previous convictions, one in 1927 for automobile theft, one in 1935 for postal extortion, and one in 1948 for violation of the Dyer Act. The district court judge ruled that he would permit impeaching questions to be asked about the latter two convictions but that the first conviction, which occurred when the defendant was eighteen years old, was too remote and was therefore inadmissible. He indicated he would give a cautionary instruction on the two convictions which he would admit. Defense counsel then requested permission to introduce the two prior convictions on direct without waiving objection. The court granted this request.

While Arnold only was directly involved, DiVarco claims that since the case was decided on the relative credibility of Arnold and Government witness Davis, permitting Arnold's impeachment, by an extortion conviction constituted reversible error as to both defendants.

The appellants rely on this appeal, as they did in the trial court, on *United States* v. *McCarthy,* 445 F.2d 587 (7th Cir. 1971). While the appellants appear in this appeal to direct our attention only to the 1935 conviction, both it and the 1948 conviction would seem to exceed the ten year limitation expressed in Proposed Rule 609(b) referred to in *McCarthy.* However, if the 1935 conviction was properly admitted there would seem to be no question as to the propriety of the 1948 conviction.

The suggestion was made in *McCarthy,* which case was considered and found not here applicable by the district court, that the Proposed Rules of Evidence for the United States District Courts and Magistrates should be used by the district courts "as guidelines and at least given consideration in the exercise of their discretion in making evidentiary rulings." 445 F.2d at 591. (Footnote omitted.)

At the outset it must be noted that the Proposed Rules, which were to have become effective automatically on July 1, 1973, have not become so and very apparently will not become effective as submitted. See *United States* v. *Kissane,* No. 71-1711 (7th Cir., May 22, 1973), and Report of Subcommittee on Criminal Justice, House Committee on the Judiciary, June 28, 1973, proposing substantial amendments and deletions to the submitted Rules.

Further, factually in *McCarthy* two prongs of Proposed Rule 609 came into play. In addition to the venerability of the conviction, the defendant there had received a full pardon. Also, there was substantial reason for believing

that the evidence of the prior conviction brought about the conviction being appealed in *McCarthy*.

Without regard then to a precise time limitation, we turn to the particular facts of the present case to determine whether the admission of the evidence was an abuse of discretion requiring reversal. We think it was not.

In our opinion, a proper test, in the absence of rule limitation, is whether the trial judge believes that the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility. See *Gordon* v. *United States*, 383 F.2d 936, 939 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968). Although the age of the prior conviction is relevant to the above-stated balancing test, the type of crime previously committed and the circumstances of the trial in which the prior conviction is introduced are also highly relevant.

The Government witness Davis had been questioned regarding his prior convictions for mail fraud by both the prosecution and the defense. In exercising his discretion, the trial judge observed:

> "I do not think that the jury should be left with the impression that Mr. Arnold has led a spotless life whereas Mr. Davis has been a man convicted. The only way you can do that is to let the evidence of Mr. Arnold's past activities in with a cautioning instruction that, one, as with respect to Mr. Davis, prior convictions are a factor which the jury may take into consideration, but they may also take into consideration the length of time which had elapsed since the last of any such convictions in weighing the credibility of any particular witness.
>
> "I think with that kind of an appropriate precautionary instruction, we get a balanced presentation of the relative credibility of the two witnesses who, I suspect, will turn over to be the key witnesses in this case."

It is further to be noted that the two prior convictions of Davis were for theft which is "universally regarded as conduct which reflects adversely on a man's honesty and integrity." *Gordon* v. *United States, supra* at 940.[3] Also, in the *Gordon* case it was observed that where a verdict depended primarily on the jury's assessment of the credibility of the accused and of his accuser, "there is greater, not less, compelling reason for exploring all avenues which would shed light on which of the two witnesses was to be believed." 383 F.2d at 941.

The trial judge did give precautionary instructions reading as follows:

> "There are some additional factors which are relevant in weighing the testimony of a witness. For example, testimony of a person who is engaged in assisting the government in the nature of an informer; that is, who provides evidence against the defendant for pay or for immunity from prosecution or personal advantage, or for vindication, should be examined and weighed by you with greater care than the testimony of an ordinary witness. This is a factor which you may take into consideration in weighing his testimony. You will have to decide whether Mr. Davis' testimony here has been affected adversely as to its accuracy by any interest or by prejudice against the defendants.
>
> "It is also a factor which you may take into consideration in weighing the credibility of a witness that a particular witness has been convicted on a previous occasion of a felony. I want you to understand in connection with Mr. Arnold, who is a defendant as distinguished from just a witness, that that is all that that prior conviction is relevant to, his

[3] The House subcommittee, while preserving time limitations but with changed language, did note, "Subdivision (a) [of Rule 609] was amended so that convictions of crimes involving dishonesty or false statements are always admissible to attack credibility.

credibility. He cannot be guilty of the offense here charged because some years back he was convicted of some other charges. Those charges are relevant only to the credibility, the extent to which they affect, as Mr. Davis' more recent convictions are relevant to his credibility, and the fact that there is a longer period of time between the convictions is another factor which you may take into consideration in deciding what effect it has on the credibility; but they are no evidence of guilt, no evidence of guilt.

"Those prior convictions have the same effect so far as Mr. Arnold is concerned as they have so far as Mr. Davis is concerned, except for the difference in the length of time, and that is, they are factors which you may take into consideration in weighing whether or not their testimony is accurate."

The instruction as to impeachment by evidence of conviction, following immediately after the instruction on Davis's status as an informer, was clearly beneficial to the defendants by highlighting both Davis's informer status and the fact that Arnold's convictions were more remote.

While granting that the conviction admitted in the trial of the present case was substantially more venerable than would be considered generally acceptable by modern standards, we, under the particular circumstances here involved, cannot say the action of the trial court constituted an abuse of discretion.

For the reasons hereinbefore set out, the judgments of conviction of the defendants are affirmed.

AFFIRMED.

A True Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

—OPINION BY JUDGE PELL—

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

August 14, 1973

Before
Hon. LEONARD P. MOORE, *Senior Circuit Judge* *
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 72-1804 *vs.*

JOSEPH DIVARCO and JOSEPH ARNOLD,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois
Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of conviction of the said District Court in this cause appealed from be, and the same are hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

---

* Senior Circuit Judge LEONARD P. MOORE of the *Second Circuit* is sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
October 10, 1973.

Before
Hon. LEONARD P. MOORE, *Senior Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 72-1804 *vs.*

JOSEPH DIVARCO and JOSEPH ARNOLD,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 72-CR-177
HERBERT J. WILL, *Judge*

On consideration of the petition of defendants-appellants, Joseph DiVarco and Joseph Arnold, for a rehearing by the court *en banc* in the above-entitled appeal, and, no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing,

IT IS ORDERED that the petition of the defendants-appellants for a rehearing *en banc* in the above entitled appeal be, and the same is hereby denied.

Motion To Stay Mandate Due October 17, 1973.

Petition For Certain Due November 9, 1973.

No. 745

DEC 6 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

JOSEPH DiVARCO and JOSEPH ARNOLD,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RAYMOND J. SMITH
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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 745

JOSEPH DiVARCO and JOSEPH ARNOLD,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Joseph DiVarco and Joseph Arnold submit this brief to supplement their prayer that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment of conviction entered by the United States District Court for the Northern District of Illinois.

ORIGINAL PETITION FOR WRIT OF CERTIORARI

The original petition for writ of certiorari was received by the Clerk of the United States Supreme Court on November 8, 1973.

GROUNDS FOR SUPPLEMENTAL BRIEF

Under Supreme Court Rule 24(5)

> "Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending calling attention to new cases or legislation or other intervening matters not available at the time of his last filing."

On May 20, 1973 the Honorable Joseph T. Sneed then the Deputy Attorney General of the United States and presently sitting on the United States Court of Appeals for the Ninth Circuit, enunciated his remarks before the Tax Section of the American Bar Association in Washington, D.C. His remarks were reported in *The Tax Lawyer* (Fall, 1973), Volume 27, No. 1, Pp. 15-22. Such remarks were not available to the Petitioners' counsel until November 19, 1973, subsequent to the submission of the petition for writ of certiorari before this Honorable Court. (See Appendix A of Supplemental Brief for excerpt of Judge Sneed's remarks.)

SUPPLEMENTAL REASON FOR GRANTING CERTIORARI

(II.)

THE DEFENDANTS' ALLEGED MISREPRESENTATIONS DID NOT CONSTITUTE AN OFFENSE UNDER TITLE 26, U.S.C., SECTION 7206(1).

The Petitioners' position throughout this case has been that a prosecution under Title 26, U.S.C., Section 72.06(1) does not lie where the accused has not demonstrated an intent to evade paying taxes; that an intentional misstatement as to the source of income, standing alone, is conduct insufficient to merit prosecution under Section 7206; and that the proper charge against such conduct arises under Title 18, Section 1001.

The Honorable Joseph T. Sneed concurred with the above proposition when he commented to the American Bar Association regarding S. 1400, 93 Congress, First Session (1973), and the recommendations of the National Commission on Reform of the Federal Criminal Laws:

> "A substantial tax deficiency is required for the Section 7201 violation but not for the lesser crime, the Section 7206 violation."
>
> "The Commission combined these two felonies to provide that a person is guilty of tax evasion if 'with intent to evade any tax, he filed or causes the filing of a tax return which is false as to a material matter' (Section 1401). Thus 'an intent to evade tax' is required in all cases of filing false returns . . ."
>
> "The requirement of an 'intent to evade' tax or tax payment in all felony cases we believe is desirable. It is a very rare case where the government fails to prove

an intent to evade; where this is not possible, other courses of action are available, such as prosecution under the general false statement provisions."

Tax Lawyer, Volume 27, No. 1, P. 18 (Fall, 1973)

After commenting on *Spies* v. *The United States*, 317 U.S. 492 (1942), Judge Sneed, speaking in his capacity as then Deputy Attorney General of the United States, stated the position of the Department of Justice:

"Thus, the Department has concluded that proof of a deficiency should remain a requirement in a tax evasion prosecution. The reasons for this are threefold. First, the tax evasion provision is the capstone of a system of sanctions designed to protect the revenue. The deficiency requirement serves as a means of identifying the 'corpus delicti' of the crime and focuses attention on fundamental point . . . the loss of revenue to the government. This comports with commonly excepted notions of tax evasion and it is difficult to make an impassioned plea that a seven year felony should attach even if no loss to the government is shown. Second, in the relatively few fragrant cases where the intent to evade is clear but a deficiency is lacking, the government can still proceed under the general attempt statute (Section 1001) if the requisite conduct toward commission of the offense can be demonstrated. Third, tax returns are also included under the proposed False Statement Statute (Section 1343), which makes it a three year felony to knowingly or with reckless disregard make a false statement of a material matter. Since conviction under this section requires neither a deficiency nor an intent to evade tax, it is not difficult to see that the major tax evasion provision should contain both requirements in order to justify the more serious felony."

Tax Lawyer, supra., P. 20.

It has been the Petitioners' position throughout the prosecution of this case that the intent, purpose and scope of Title 26, Section 7206(1) is limited to cases where the accused made a false understatement of income or a false overstatement of deductions or other such misstatements with the intent to evade taxation. The embodied remarks of Judge Sneed supplemented herein confirm this premise.

CONCLUSION

For the foregoing reasons the Petitioners respectfully resubmit that a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

RAYMOND G. SMITH
Attorney for Petitioners

WILLIAM J. HADDAD
Of Counsel

SUPREME

No. 73-745

JAN 10 1974

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

JOSEPH DIVARCO AND JOSEPH ARNOLD,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-745

JOSEPH DIVARCO AND JOSEPH ARNOLD,
PETITIONERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Illinois, each petitioner was convicted in 1972 of making and subscribing a false statement on his 1965 tax return under penalty of perjury in violation of Section 7206(1) of the Internal Revenue Code of 1954, and of conspiracy to report a false source of income in violation of 18 U.S.C. 371. Each petitioner was sentenced to concurrent sentences of one year imprisonment on the conspiracy count and five years' probation on the substantive counts (Pet. App. 1, 2).

Petitioner Arnold asserts that the government improperly introduced evidence for purposes of impeachment of his two prior felony convictions. Both petitioners urge that misrepresentation of the source of income, but not the amount, is not a "false statement" under Section 7206(1).

1. Each petitioner was convicted of falsely subscribing on his income tax return for 1965 that Chemical Mortgage and Investment Corporation was a source of a portion of his income. According to the testimony (Tr. 278, 290, 324-327, 426-429, 590)[1] of the government witness Davis, who had access to the records of Chemical Mortgage and Investment Corporation, and the government's summary of evidence (Govt. Exs. 24, 25, 26) tracing its expenditures for 1965, neither petitioner had income from that corporation. Davis testified that petitioner Arnold repeatedly requested permission to use Chemical Mortgage and Investment Corporation as a reportable source of income for himself and DiVarco (Tr. 430-433). Davis further testified that he subsequently provided false W-2 forms at Arnold's request (Tr. 436-438, 1005).

Only petitioner Arnold took the stand. He denied Davis' testimony and stated that the W-2 forms from Chemical Mortgage and Investment Corporation used by himself and petitioner DiVarco were issued for profits on investments made by them (Tr. 997-998). Evidence of Davis' prior criminal convictions was introduced by petitioners in order to impeach his testimony. In order to give a balanced presentation of the relative credibility of Davis and petitioner Arnold, the district court ruled that the government could attempt to impeach Arnold's testimony by introducing evidence of petitioner Arnold's respective 1935 and 1948 convictions for postal extortion and interstate transportation of a motor vehicle knowing that it had been stolen. However, with respect to this evidence the district court gave the jury a cautionary instruction (Pet. App. 13-14).

---

[1] "Tr." references are to the transcript of trial proceedings. "Ex." references are to exhibits introduced at trial.

The court of appeals noted that both of Davis' convictions were for theft, "which is 'universally regarded as conduct which reflects adversely on a man's honesty' " (Pet. App. 13). Under these circumstances, where the verdict would depend upon the jury's assessment of the credibility of Davis and petitioner Arnold, the court of appeals found that the district court had not abused its discretion in allowing the introduction of evidence of Arnold's prior conviction for impeachment purposes (Pet. App. 14).

2. As the court of appeals correctly stated (Pet. App. 12), there is no absolute period of limitations with respect to prior convictions in order to impeach the testimony of a defendant who takes the stand in his own behalf. While Rule 609(b) of the Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates suggests a ten year limitation on the admission of a prior criminal conviction, the court of appeals noted (Pet. App. 11) that those rules have not yet become effective. The fact that the Seventh Circuit had adhered to the guidelines of Proposed Rule 609(b) in *United States* v. *McCarthy,* 445 F. 2d 587, did not, as petitioner Arnold contends (Pet. 4-6), require it to apply the Proposed Rule here.[2]

Since there is no fixed cut off period, the court of appeals properly employed the test of "whether the trial judge believes that the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility" (Pet. App. 12). See *Gordon* v. *United States,* 383 F. 2d 936, 939-940 (C.A. D.C.), certiorari denied, 390 U.S.

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[2] Moreover, in *McCarthy,* the defendant had received a full pardon with respect to the prior conviction.

1029. Such a test is well within this Court's observation in *McGautha* v. *California,* 402 U.S. 183, 215, that:

> It is also generally recognized that a defendant who takes the stand in his own behalf may be impeached by proof of prior convictions or the like. See *Spencer* v. *Texas,* 385 U.S., at 561; cf. *Michelson* v. *United States,* 335 U.S. 469 (1948); * * *.

In *McGautha,* the Court also cited *United States* v. *Palumbo,* 401 F. 2d 270 (C.A. 2), certiorari denied, 394 U.S. 947. There, the testimony of a witness was impeached by evidence of five convictions which were between 21 and 38 years old. Introduction of such prior convictions was held to be within the discretion of the trial judge. Similarly, here, where evidence of the prior convictions of the government witness for theft was first introduced by petitioners for impeachment purposes, the district court did not abuse its discretion in thereafter admitting evidence of Arnold's prior convictions for essentially similar offenses reflecting upon his basic honesty.

3. Petitioners further contend (Pet. 7-8) that their misrepresentation as to the source of their income is not a "false statement" within the meaning of Section 7206 (1) of the Code. They urge (Pet. 7-8) that "[o]nly income tax cases are contemplated under Title 26, Section 7206(1) and, therefore, there must be, for example, a false understatement of income, a false overstatement of deductions, a false understatement of capital gains, a false overstatement of capital losses, or the false reporting of a long term capital gain where, in fact, a short term capital gain occurred."

But by its terms, Section 7206(1) reaches every material falsehood, intentionally made, in a return or other document, subscribed under penalty of perjury. Indeed, petitioners concede (Pet. 8) that there is an overlap between 18 U.S.C. 1001 and Section 7206(1) and that in a proper case the government may choose between the two statutes in bringing a prosecution. See *United States* v. *Rayor,* 204 F. Supp. 486, 490 (S.D. Cal.), affirmed, 323 F. 2d 519 (C.A. 9), certiorari denied, 375 U.S. 993.

Contrary to petitioners' assertion (Pet. 7), they are not the first persons to be convicted under Section 7206(1) for a false statement not relating to their tax liability. For example, in *Jaben* v. *United States,* 349 F. 2d 913, 915-916 (C.A. 8), a false statement upon an application for an extension of time within which to file a tax return was held to be sufficient to support a conviction under Section 7206(1). See also *United States* v. *Willoz,* 449 F. 2d 1321, 1322, 1325 (C.A. 5), where the omission of an additional business address on a special wagering tax return was held to be a false statement within the meaning of Section 7206(1). Moreover, numerous circuits have held that the existence of a tax deficiency is not a prerequisite for a conviction for a false statement under Section 7206(1). The purpose of Section 7206(1) is to impose a penalty for perjury upon those who willfully make false statements on returns or other documents regardless of whether the falsehood has any tax consequences.. See, *e.g., Gaunt* v. *United States,* 184 F. 2d 284, 288 (C.A. 1), certiorari denied, 340 U.S. 917; *United States* v. *Tadio,* 223 F. 2d 759 (C.A. 2), certiorari denied, 350 U.S. 874; *United States* v. *Jernigan,* 411 F. 2d 471 (C.A. 5); *United States* v. *Lodwick,* 410 F. 2d 1202

(C.A. 8); *Schepps* v. *United States,* 395 F. 2d 749 (C.A. 5), certiorari denied, 393 U.S. 925; *United States* v. *Engle,* 458 F. 2d 1017 (C.A. 8).

For the reasons stated, it is respectully submited that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1974.